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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Hyperion Telecommunications, Inc Petition Requesting Forbearance	)	**CCB/CPD No. 96-3**
Time Warner Communications Petition for Forbearance	)	**CCB/CPD No. 96-7**
Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)	**CC Docket No. 97-146**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits the following comments in response to the Notice of Proposed Rulemaking, FCC 97-219 (released June 19, 1997) in the captioned docket ("Notice").[1] Specifically, TRA strongly opposes the Notice's proposal to "establish complete, *i.e.*, mandatory detariffing, for . . . non-ILEC providers of interstate exchange access services. As TRA will demonstrate below, the Commission not only lacks the

[1] TRA is a national trade association consisting of more than 500 resale carriers and their underlying product and service vendors. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or will soon be, offering local exchange and/or exchange access services.

statutory authority, but the requisite public interest basis, to prohibit competitive access providers ("CAPs") and competitive local exchange carriers ("LECs") from filing tariffs setting forth the rates, terms and conditions for and at which they will provide interstate exchange access services. Regardless of whether the detariffing policy adopted by the Commission here is permissive or mandatory, TRA urges Commission, as it did with respect to nondominant interexchange carriers ("IXCs"), to require each CAP and CLEC to make available to the public "information concerning its current rates, terms and conditions for all of its detariffed . . . service" in a manner consistent with Section 42.10 of the Commission's Rules, 47 C.F.R. § 42.10.

ARGUMENT

I. The Commission Lacks the Statutory Authority to Prohibit CAPs and CLECs from Filing Tariffs

Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160 (the "Act"), authorizes the Commission to "forbear from applying " provisions of the Act or regulations promulgated thereunder in the event the Commission makes certain identified determinations. The Notice interprets the phrase "forbear from applying" to encompass not only the ability to refrain from enforcing the Act's tariff-filing requirements with respect to CAPs and CLECs, but to afford the Commission the further additional authority to affirmatively prohibit such carriers from exercising what heretofore has been recognized as a statutory right to file tariffs. Forbearance authority, as interpreted by the Notice, empowers the Commission to adopt not only permissive, but mandatory, detariffing.

TRA submits that the Notice misreads Section 10. A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary,

contemporary, common meaning.[2] "Indeed, unless contrary indications are present, a court can assume that Congress intended the common usage of the term to apply."[3] Or as eloquently stated by Chief Justice Marshal more than a century ago:

> [The] intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.[4]

The "ordinary meaning" of the term "forbear" is "refraining from action . . . in contradistinction from 'act'."[5] TRA is unaware of any commonly-used dictionary which extends the definition of "forbear" to include the concept of prohibition.[6] Thus, Section 10 empowers the Commission only to refrain from enforcing the mandate of Section 203, allowing CAPs and CLECs the opportunity to avoid filing interstate exchange access tariffs. Section 10 does not authorize the Commission to prohibit CAPs and CLECs from voluntarily filing such tariffs.

It matters little that the Commission has previously used the term "forbearance" in conjunction with mandatory detariffing.[7] As noted above, words in statutes should be given their

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2 Perrin v. United States, 444 U.S. 37, 42 (1979).

3 Inner City Broadcasting v. Sanders, 733 F.2d 154, 158 (D.C. Cir. 1984).

4 United States v. Wiltberger, 5 Wheat. 76, 95 - 96 (1820)

5 *See, e.g.*, Black's Law Dictionary, Revised Sixth Edition, 644 (1990); Webster's New World Dictionary, Second College Edition, 544 (1976) .

6 MCI Telecommunications Co. v. American Telephone and Telegraph Co., 114 S.Ct. 2223, 2230 (1994) ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in a minor fashion. . . . Most cases of verbal ambiguity in statutes involve . . . a selection among accepted alternative meanings shown as such by many dictionaries.")

7 *See, e.g.*, MCI Telecommunications Corp. v. FCC, 765 F.2d. 1186, 1189 (D.C. Cir. 1985).

"ordinary meaning" unless otherwise defined in or required by the statute. "In construing a statute in a case of first impression, the court looks first to the language of the statute itself, then to its legislative history, and then to the interpretation given to it by its administering agency."[8] However, "the language of a statute controls when sufficiently clear in its context."[9] Hence, no resort need, or should, be taken here to matters outside the four corners of the statute because their is no ambiguity in the word "forbear."[10]

The only case that has been cited by the Commission to suggest that courts have recognized a power of prohibition in the word "forbear" provides the Notice no assistance.[11] Thus, the Commission has argued that the U.S. Court of Appeals for the District of Columbia decision upholding in National Small Shipments Traffic Conference, Inc. V. CAB, 618 F.2d 819 (D.C. Cir. 1980), a Civil Aeronautics Board ("CAB") ruling that the statutory authority to "exempt" empowered it to prohibit the filing of agreements for its approval, supports the Commission's expansive reading of the word "forbear." The National Small Shipments Traffic Conference case, however, did not involve deprivation of carriers' statutory rights. Here, the statutory right of

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[8] Bresgal v. Brock, 843 F.2d 1163, 1166 (7th Cir. 1987).

[9] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976), *rehearing denied* 425 U.S. 986 (1977)..

[10] Notably, the Commission has also characterized its detariffing actions as an exercise of the agency's enforcement discretion pursuant to which the Commission declined to enforce tariff-filing requirements. American Telephone and Telegraph Co. V. FCC, 978 F.2d 727, 730 (D.C. Cir. 1992, *aff'd sub. nom* MCI Telecommunications Co. v. American Telephone and Telegraph Co., 114 S.Ct. 2223, 2230 (1994).

[11] Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd. 20730, ¶ 74 (1996), *recon. pending, pet. for rev. pending* MCI Telecommunications Corp. v. FCC, Case No. 96-1459 (D.C. Cir. December 2, 1997), *stay granted* (February 13, 1997).

telecommunications common carriers to file and amend tariffs has been long recognized.[12] Moreover, the U.S. Court of Appeals for the District of Columbia Circuit has described mandatory detariffing as going "beyond mere forbearance."[13]

In sum, Congress' use of the term "forbear" confirms that the Commission has the statutory authority to relieve CAPs and CLECs of federal tariff-filing obligations, but not to deprive them of their statutory right to file tariffs. As the U.S. Court of Appeals for the District of Columbia Circuit succinctly stated:

> [I]f the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress . . . not from the Commission's own conception of how the statute should be rewritten in light of changed circumstances.[14]

II. The Notice's Assessment of the Public Interest is Misguided

Apart from the Commission's lack of statutory authority to adopt a policy of mandatory detariffing for CAPs and CLECs, the Notice fails altogether to satisfy the statutory forbearance standard. Section 10 sanctions forbearance only in those instances in which the Commission affirmatively determines that enforcement of a statutory or regulatory requirement is (I) not necessary to ensure just, reasonable and nondiscriminatory rates, terms and conditions; (ii) not required to protect consumers; and (iii) is consistent with the public interest. Moreover, Section requires that the Commission consider the competitive impact of any exercise of its forbearance authority.

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[12] *See, e.g.,* American Telephone and Telegraph Co. v. FCC, 487 F.2d 864 (2d Cir. 1973).

[13] American Telephone and Telegraph Co. V. FCC, 978 F.2d 727 at 729.

[14] MCI Telecommunications Corp. v. FCC, 765 F.2d. at 1195.

The Notice asserts that a policy of mandatory detariffing as applied to CAPs and CLECs satisfies the public interest component of the forbearance standard by providing a host of benefits. For carriers, the Notice opines that mandatory detariffing would reduce transaction costs and administrative burdens, permit rapid response to market conditions, and facilitate entry by new providers. For consumers, the Notice asserts that mandatory detariffing would provide protection against the filed tariff doctrine and eliminate the threat of price collusion. And for the Commission, the Notice declares that mandatory detariffing would "reduce the administrative burden on the Commission of maintaining the tariff filing program."[15] TRA submits that several of the benefits identified by the Notice can be secured without resort to mandatory detariffing; the Notice is simply wrong with respect to other claimed benefits. Moreover, the Notice inexplicably ignores the high costs for carriers and consumers that are associated with mandatory detariffing.

The Notice is correct that mandatory detariffing will relieve the Commission of the administrative burden of reviewing and maintaining tariffs. If sparing the Commission resource expenditures were the sole criterion for forbearance, the Commission could forbear from any and all of its regulatory responsibilities -- a result clearly not envisioned by Congress. Moreover, other less harmful alternatives would accomplish this result. Thus, TRA has proposed in CC Docket No. 96-61 that the Commission establish a electronic tariff filing system like the Commission adopted in CC Docket No. 96-187. As the Commission there explained:

> We find that a program for the electronic filing of tariffs and associated documents would facilitate administration of tariffs. An electronic filing program could afford filing parties a quick and economical means to file tariffs while giving interested parties virtually instant notification and access to the tariffs. . . . An

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[15] Notice, FCC 97-219 at ¶ 34

> electronic filing system also should not impose undue burdens on LECs, but rather reduce their overall administrative burdens.[16]

While the Commission has elected to administer the CC Docket No. 97-187 electronic filing program, a comparable program for CAPs and CLECs could be carrier-administered, relieving the Commission of virtually all administrative burdens associated with tariff filings by these entities.

The Notice is sadly mistaken in its belief that mandatory detariffing would reduce transaction costs or administrative burdens for CAPs and CLECs. To the contrary, the burdens attendant to the filing of tariffs pale in comparison to the increased transaction costs and administrative burdens that would be occasioned by the absence of tariffs. Tariffs provide an efficient and cost-effective means of documenting the general terms and conditions pursuant to which telecommunications services are provided. Tariffs thus allow for streamlined contracts, or in the case of low volume business and residential customers, no contracts whatsoever. Elimination of tariffs would necessitate renegotiation of existing contracts and for the pervasive use and increased complexity of contracts in the future.

The Notice is also mistaken that mandatory detariffing would facilitate new market entry and permit more rapid responses to market conditions. In the overall scheme of things, federal tariffing requirements are one of the least demanding of the myriad tasks facing new entrants to the local exchange/exchange access market. Securing State regulatory certifications, negotiating network access/interconnection or resale agreements, obtaining the necessary financing, and constructing the operational, business and marketing infrastructure are but few of the many daunting tasks confronting prospective CAPs and CLECs that dwarf federal tariffing requirements as

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[16] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, 12 FCC Rcd. 2170, ¶ 47 (1997), *recon. pending, pet. for rev. pending* America's Carriers Telecommunications Association v. FCC, Case No. 97-1213 (D.C. Cir. March 30, 1997).

obstacles to new market entry. And once a carrier has entered the market, tariffs which can be filed on a permissive basis with little or no advance notice hardly constrain carriers' ability to introduce new services or price compete. The Notice's concerns in this respect are seemingly predicated on tariff fiing notice requirements of extended duration which have been relaxed. Consumers, of course, will ultimately bear the burden of carriers' increased transactional costs and administrative burdens either through higher telecommunications prices or reduced carrier and service options.

Concerns expressed in the Notice regarding price collusion and abuse of the filed tariff doctrine are "red herrings." Pricing information for broad-based residential and small business services is publicly disclosed through advertising. While the prices, terms and conditions involved in larger negotiated service arrangements are generally held in greater confidence, the unavailability of this information would actually dampen, rather than foster. price and service competition. All but the largest consumers of telecommunications services, including TRA's resale carrier members, actually utilize tariffed information to drive more aggressive pricing and service offers.

The harmful effects of the filed tariff doctrine, to the extent that it is deemed to apply in a permissive detariffing environment, can be negated through means which would not adversely impact carriers and the overwhelming majority of telecommunications consumers for whom the filed tariff doctrine is not a concern. TRA submits that the Commission could declare unjust and unreasonable, and hence unenforceable as unlawful, any tariff revisions which alter such material elements of extended-term service arrangements as rates, performance requirements, termination liability, deposit and other security obligations and the like, thereby eliminating potential abuses of the filed tariff doctrine. The filed tariff doctrine is a creature of statutory and regulatory requirements and is thus subject to limitation by the Congress and the Commission.

In short, the Notice's public interest rational for adopting a policy of mandatory detariffing fails to withstand scrutiny. Indeed, it is readily apparent that such a policy would cause substantial harm, with little or no countervailing benefits which could not be secured without occasioning injury to consumers and carriers alike.

III. The Commission Should Extend Section 42.10 of Its Rules to CAPs and CLECs

Whether the Commission retains permissive detariffing or elects to make detariffing mandatory for CAPs and CLECs, TRA strongly urges it to extend the requirements of Section 42.10 to the interstate exchange access services of such carriers. Section 42.10 requires each nondominant interexchange carrier to make publicly available "in at least one location . . . information concerning its current rates, terms and conditions for all its . . . services . . . in an easy to understand format and in a timely manner." Public access to such information is critical in TRA's view to the continued viability of the Communications Act's nondiscrimination requirements and the Commission's pro-competitive resale policies.

The Commission has recognized the public interest benefits of public access to information regarding rates and services. Thus, in response to concerns expressed by TRA regarding the detarifffing of domestic interstate interexchange service offerings, the Commission asserted:

> In addition . . .we will require nondominant interexchange carriers to provide rate and service information on all of their interstate, domestic, interexchange services to consumers, including resellers. Thus, resellers will be able to determine whether nondominant interexchange carriers have imposed rates, practices, classifications or regulations that unreasonably discriminate against resellers, and to bring a complaint if necessary.[17]

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[17] Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd. 20703 at ¶ 27.

Elsewhere, the Commission has acknowledged that all consumers derive a like benefit from public access to such information, declaring "that publicly available information is necessary to ensure that consumers can bring complaints" and facilitates the "valuable function" performed by "[b]usinesses and consumer organizations that analyze and compare rates and services . . . {to] assist[] consumers to judge the specific carriers' rates and service plans that are best suited to their individual needs."[18]

TRA submits that these benefits are equally important in the local environment.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to decline the Notice's invitation to adopt a policy of mandatory detariffing for the interstate access offerings of CAPs and CLECs. TRA further requests that the Commission extend the reach of Section 42.10 of its Rules to apply to these carriers.

Respectfully submitted,

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[18] Id. at ¶¶ 84 - 85.